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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. 79-1388

KARL J. KIRCHBERG,

Appellant,

v.

JOAN PAILLOT FEENSTRA,

Appellee,

v.

EDWIN W. EDWARDS and STATE OF LOUISIANA.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Pursuant to Rule 53, paragraph 1, of the Rules of this Court, motion is hereby made that the appellee, JOAN PAILLOT FEENSTRA, be allowed to proceed in forma pauperis before this Court for the reasons stated in the attached affidavit.

Respectfully submitted,

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Geo. M. Strickler Jr.

Counsel for Appellee

AFFIDAVIT

STATE OF LOUISIANA

PARISH OF ORLEANS

JOAN FEENSTRA, being duly sworn, deposes and says in support of her motion for leave to proceed in forma pauperis:

1. I am the appellee in the case docketed in the United States Supreme Court, KARL J. KIRCHBERG v. JOAN PAILLOT FEENSTRA, ET AL., No. 79-1388.

2. My sole source of income for myself and my minor child is $208.00 per month from Supplemental Security Income and $57.00 per month from Aid to Families with Dependent Children. Because of my poverty, I am unable to pay the costs of this action or give security therefor and still be able to provide myself and my dependent child with the necessities of life.

3. Appellant Kirchberg seeks review of a decision of the Fifth Circuit Court of Appeals that held unconstitutional Louisiana's head and master statute that allows the husband alone the right to unilaterally alienate and encumber community real property without the wife's consent. I believe that I am entitled to redress and to affirmance of the decision below in order to protect my home from foreclosure of the mortgage that appellant obtained from my former husband without my knowledge or consent.

Joan Feenstra

Sworn to and subscribed before me,
this 4th day of April, 1980.

NOTARY PUBLIC

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Appellant,

v.

JOAN PAILLOT FEENSTRA,

Appellee.

MOTION TO AFFIRM

Appellee, pursuant to Rule 16 of the Rules of this Court, moves that the final judgment and decree of the United States Court of Appeals for the Fifth Circuit be affirmed on the ground that the question is so unsubstantial as not to warrant further argument.

I.

STATEMENT

This case involves the constitutionality of Louisiana Civil Code Article 2404 which made the husband the "head and master" of the community estate.[1] It gave the husband, but not the wife, the exclusive power to alienate and encumber community property, and to do so without the wife's consent.

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[1] Article 2404 was legislatively repealed in 1979. Effective January 1, 1980, a gender neutral scheme of joint community property management replaced the prior head and master regime. La. Civ. Code, arts. 2325-2376. See generally opinion below, Kirchberg v. Feenstra, 609 F.2d 727, 729 n. 1 (5th Cir. 1979).

In October, 1974, Mrs. Feenstra, appellee herein, filed criminal charges against her husband for molesting their child. While in Parish prison, Mr. Feenstra retained appellant Karl J. Kirchberg to represent him on that charge. Mr. Feenstra executed and delivered to appellant Kirchberg a promissory note for $3,000 as pre-payment of legal services, with interest at the rate of 8% per annum and providing for 30% additional attorneys' fees if not paid when due. Mr. Feenstra immediately paid appellant over $800 on that note. In order to secure full payment of the $3000 note, Mr. Kirchberg required Mr. Feenstra to execute a mortgage on certain real property that had been purchased by Mr. and Mrs. Feenstra. That property was community property under state law, and it was in the name of both spouses. Mrs. Feenstra neither consented to nor was she informed of the mortgage. A few days later, Mrs. Feenstra dropped the criminal charges against her husband. The spouses separated, and Mrs. Feenstra remained with her child on the mortgaged property. Sometime thereafter, Mr. Kirchberg demanded payment from Mrs. Feenstra of the remainder due on the note and threatened seizure of her home unless she paid her husband's debt. That was the first indication Mrs. Feenstra had of the mortgage on her property. Appellant Kirchberg then petitioned for foreclosure by executory process in the state courts in February, 1976.

Appellant Kirchberg also filed an action in the United States District Court for the Eastern District of Louisiana seeking a declaratory judgment that he had not violated the Truth-in-Lending-Act, 15 U.S.C. § 1635(a), in connection with the mortgage. Mrs. Feenstra counterclaimed, inter alia, against appellant Kirchberg, the State of Louisiana and the Governor, urging that Louisiana Civil Code Article 2334 was unconstitutional on Equal Protection and Due Process grounds. Article 2334, as it existed prior to January 1, 1977, restricted the husband's Article 2404 powers to alienate property, provided that the wife had taken the affirm-

ative and additional step of executing and filing a notarized declaration that her consent and authority were needed for any subsequent alienation or encumbering of that property.[2] Mrs. Feenstra had made no such declaration.

The District Court in April, 1977, granted the motion of the State of Louisiana for summary judgment on Mrs. Feenstra's counterclaim for a declaration of unconstitutionality. The District Court (as did the Court of Appeals) saw the gravamen of her claim as directed against Article 2404, the head and master provision that gave the husband the exclusive power to unilaterally alienate the community estate, rather than against Article 2334 which could operate to partially restrict the husband's Article 2404 powers of alienation.

Mrs. Feenstra appealed the constitutional claim against appellant Kirchberg, the State of Louisiana and the Governor. The Fifth Circuit panel unanimously reversed, finding that Article 2404 was unconstitutional under the fourteenth amendment. The case was decided in an opinion issued December 12, 1979. A mandate issued on January 3, 1980 to the District Court. On January 1, 1980, Louisiana's current gender-neutral scheme for community property management went into effect. See above at n. 1. The new law, which came too late to benefit Mrs. Feenstra, repealed the statute declared to be unconstitutional by the Fifth Circuit. Only Mr. Kirchberg has appealed the Fifth Circuit's ruling to this Court.

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[2] Since January 1, 1977, Louisiana Civil Code Article 2334 provided that any real property standing in the names of both spouses could not be mortgaged without the wife's consent. See opinion below, 609 F.2d at 730. That revision was not applicable to the 1974 mortgage at issue herein. Id. at n. 2.

II.

ARGUMENT

A. The merits of the constitutional claim warrant summary affirmance.

The Court of Appeals' decision is plainly correct, and prior rulings by this Court demonstrate that the issue of Article 2404's constitutionality is foreclosed in appellee's favor. Where legislative classifications by gender exist, and the sexes are similarly situated, it is well established that such "classifications . . . must serve important governmental objectives and be substantially related to achievement of those objectives." Califano v. Webster, 430 U.S. 313, 316-317 (1977) (per curiam); Craig v. Boren, 429 U.S. 190, 197 (1977). More recent decisions of this Court have reaffirmed the applicability of this "intermediate" standard of scrutiny to such gender based classifications. See, e.g., Caban v. Mohammed, 441 U.S. 380, 388 (1979); Parham v. Hughes, 441 U.S. 347, 359 (1979) (concurring opinion of Powell, J.); Orr v. Orr, 440 U.S. 276, 279 (1979).

The Court of Appeals found that the State of Louisiana had failed to articulate an objective sufficient to withstand such scrutiny, and the court was unable to discern one. See opinion below, 609 F.2d at 734-735. Legislative provision for the management of marital property is certainly a valid interest of the state, but any such objective could obviously have "be[en] protected by means that d[id] not draw such an inflexible gender-based distinction." Caban v. Mohammed, supra, 441 U.S. at 392. As noted in Orr v. Orr, supra,

> Where . . . the State's . . . purposes are as well served by a gender neutral classification as one that gender classifies and therefore carries with it the baggage of sexual stereotypes, the State cannot be permitted to classify on the basis of sex.
>
> 440 U.S. at 283.

The state's failure to make the necessary inquiry into less generalizing gender-neutral means, plus the apparent availability of such means, resolves the analysis against the statute's constitutionality. The bare argument of administrative efficiency that was urged below was properly rejected, since statutory purposes reflecting the "State's preference" for a particular "allocation of family responsibilities under which the wife plays a dependent role" are impermissible. Orr v. Orr, supra, 440 U.S. at 279. See also Reed v. Reed, 404 U.S. 71, 76-77 (1971) (avoidance of "intra-family controversy" may not be mandated on the basis of sex). Assuming, therefore, that this intermediate tier of scrutiny is triggered, this Court's prior line of decisions necessarily precludes a finding contrary to that of the court below.

Moreover, the scrutiny noted above is fully applicable here. First of all, there is nothing to suggest that Article 2404's classification is related to any innate difference between men and women or that the sexes are somehow not similarly situated. Compare, e.g., Parham v. Hughes, supra (recognizing problematic aspects of proving natural father's versus natural mother's identity); Schlesinger v. Ballard, 419 U.S. 498 (1975) (dissimilar career opportunities properly reflected in different promotion rules for the sexes). Rather, the statute classifies solely on the basis of "administrative convenience and outworn cliches" by suggesting that men are to be preferred as marital property administrators to women. See Parham v. Hughes, supra, 440 U.S. at 355 (plurality opinion). On this score, the case is indistinguishable from Reed v. Reed, supra, which struck down Idaho's male preference laws regulating decedent estate administration. Like other classifications that this Court has overturned, Article 2404 runs the "inherent risk of reinforcing the stereotypes about the 'proper place' of women." Orr v. Orr, supra, 440 U.S. at 238; see also Caban v. Mohammed, supra, 441 U.S. at 389. The presumption that

the world of the marketplace is more appropriate for males than females has been consistently rejected as a basis for legislative distinctions. See, e.g., Orr v. Orr, supra, 440 U.S. at 283; Craig v. Boren, supra, 429 U.S. at 198 n. 14; Stanton v. Stanton, 421 U.S. 7, 14-15 (1975). Cf. Taylor v. Louisiana, 419 U.S. 522, 535 n. 17 (1975) (invalidating in face of sixth amendment challenge Louisiana's requirement that women alone take the affirmative step of previously filing a written declaration before being subject to jury service).

In addition, it cannot be seriously urged that the statute does not, in fact, gender classify. Compare, e.g., Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256 (1979) (upholding facially neutral veterans preference statute). By its terms, the statute makes the husband alone the head and master, permitting him to alienate without his wife's consent. Had appellee, or any wife, desired to avoid the harshness of the codal provision, with respect to property such as that involved herein, she must have taken the affirmative step of filing a declaration stating that her authority and consent were required for any subsequent encumbering or alienation. Alternatively, she would have been required to secure her husband's agreement to relinquish his statutorily conferred advantages and contract-out of the community property regime. See generally opinion below, 609 F.2d at 732-734. In no event could the wife herself alienate without her husband's consent. The fact that there might have been no "insurmountable barrier" to the wife's protecting her interest is without constitutional significance here. Cf. Trimble v. Gordon, 430 U.S. 762, 773-774 & 775 n. 16 (1977). It is enough that a barrier is created for women only which is not otherwise constitutionally justified. As the court below aptly remarked:

> Because husbands can be made managers by agreement of the parties to the marriage without transactional costs and wives cannot, Louisiana law extends a benefit to

men that is not extended to women.

609 F.2d at 734.

Finally, there is no other basis on which application of this middle tier of scrutiny might be avoided, or which might affect the outcome of that scrutiny once applied. The State's suggestion below, and echoed by appellant herein, is that deference is warranted where a state's regulation of property disposition and regulation of family life is concerned. See Labine v. Vincent, 401 U.S. 532 (1971). That argument is unavailing here. While a state may have a valid interest in promoting family life by discouraging illicit relationships through certain legislative distinctions between legitimacy and illegitimacy, such an interest is not implicated in a head and master system that seeks only to promote and perpetuate certain roles for the sexes within the family. Compare, e.g., Parham v. Hughes, supra; Lalli v. Lalli, 439 U.S. 259 (1979) (plurality opinion); Labine v. Vincent, supra. In addition, whatever latitude may be accorded a state's regulations pertaining to property disposition, "there is a point beyond which deference cannot justify discrimination." Trimble v. Gordon, supra, 430 U.S. at 767-768 n. 12 (explicitly limiting any contrary implication in Labine, supra); see also Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 172 (1972) ("Though the latitude given state economic and social regulation is necessarily broad, when state statutory classifications approach sensitive and fundamental rights, this Court exercises a stricter scrutiny"). While the proposition is self-evident, the fourteenth amendment is not rendered inoperative by the presence of state statutes that implicate property disposition. See Reed v. Reed, supra. Given Article 2404's invidious discrimination and the availability of less sweeping, gender neutral means to achieve the state's permissible objectives, the requisite intermediate scrutiny is not satisfied, much less foreclosed. The merits of this claim warrant summary affirmance.

B. Plenary consideration is otherwise unwarranted.

There are other factors strongly militating against plenary consideration by this Court. The decision below was explicitly made nonretroactive. It was decided in an opinion issued on December 12, 1979. On January 1, 1980, previously passed legislation went into effect that repealed Article 2404, substituting in its place a comprehensive gender-neutral scheme for community property management. Thus, even in the absence of the Fifth Circuit's decision of unconstitutionality, the head and master system has been laid to rest. It is also unlikely that anyone other than the parties litigant will be affected by this decision. In addition, neither the State nor the Governor have bothered to appeal the Fifth Circuit's decision. Their conspicuous absence coupled with the legislative interment of Article 2404 suggest that the state's interests would be minimally affected, if at all, by summary disposition of this case. Appellant's catalog of horrors portending the dismantling of "vested rights" and the wide-scale undermining of settled expectations is, in light of these events, exaggerated. Moreover, Mr. Kirchberg's own "financial interests" (Jurisdictional Statement at 7), if relevant, are de minimis. The mortgage in question was given by the husband as security for a promissory note. The Fifth Circuit's decision does not purport to affect Mr. Kirchberg's rights to enforce the note personally against Mr. Feenstra. These factors all minimize the importance of this case, and speak for summary disposition.

C. No other substantial questions are presented.

Appellant has presented two additional questions that purport to be implicated in this appeal. The first asks whether the Court of Appeals overruled, not just a statute, but "in effect overrule[d] major principles of the Civil Law of Louisiana." (Jurisdictional Statement at 4). As previously suggested, the ramifications of this ruling are negligible given the Article's legisla-

tive repeal and the court's prospective ruling. Any statutory ga that might otherwise have been created by the ruling were quickl filled. Neither the ruling nor the new legislation purport to u set the continued existence of a community property regime withi the state. Moreover, while the "head and master" provision may have been a fundamental principle of one part of the Civil Code, no less fundamental is the duty of the judiciary to rule on case and controversies properly before them and to state "what the law is." United States v. Nixon, 418 U.S. 683, 703 (1974), quoting from Marbury v. Madison, 1 Cranch 137 (1803). Finally, assuming that this question is directed to the propriety of a federal cour passing on state schemes concerning the family or property, it ha been addressed above (p. 7).

Appellant's third question asks whether the Fifth Circuit determination that its decision is nonretroactive means that the decision is inapplicable to the parties litigant. This also does not present a substantial question for this court's consideration.

> As is well known, the federal courts established pursuant to Article III of the Constitution do not render advisory opinions. For adjudication of Constitutional issues, "concrete legal issues presented in actual cases, not abstractions" are requisite. This is as true of declaratory judgments as any other field.
>
> United Public Workers v. Mitchell 330 U.S. 75, 89 (1947).

Whatever debate may exist as to the appropriate effect of constitutional overrulings on non-parties, any ruling, including a prospective one, is applicable to the parties litigant. The requirement that Mrs. Feenstra benefit from the prospective overruling is "an unavoidable consequence of the necessity that constitutional adjudications not stand as mere dictum." Stovall v. Denno, 388 U.S. 293, 301 (1967). See also Comment, 71 Yale L. J. 907, 933 (1962); H. Wellington, Notes on Adjudication, 83 Yale L. J. 221, 260 n. 102 (1973); United States v. Peltier, 422 U.S. 531, 547-

548 n.6 (Brennan, J. dissenting); but cf. Linkletter v. Walker, 381 U.S. 618, 621-622 (dictum).

Even if a constitutional ruling by an Article III court which was non-binding on the parties litigant were constitutionally permissible, there is no justification for, and the Fifth Circuit did not make, such a ruling here. (See Jurisdictional Statement at 5 & 7). The Court of Appeals went out of its way to note the existence of an actual controversy in appellant's continued avowal to enforce his mortgage. 609 F.2d at 731. Moreover, this issue was fully briefed below by the State and appellee herein. The State's own brief urged the Court to grant prospective relief that would be applicable to Mrs. Feenstra alone. Her Reply Brief agreed with the State on the question of prospectivity, and urged that it should not be at issue. Given the expressed desires of the briefing parties and given the standard learning that prospective rulings apply to the parties litigant, it is inconceivable that the Fifth Circuit took the extraordinary course of not applying its decision to the parties herein. Moreover, clarification of the Fifth Circuit's meaning as to its opinions may be accomplished by means other than recourse to this Court.

III.

CONCLUSION

For the above reasons, appellee respectfully submits that appellee presents no substantial question for the decision of this Court, and that the judgment of the Fifth Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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Counsel for Appellee

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion for Leave to Proceed in Forma Pauperis, accompanying affidavit, and Motion to Affirm, were mailed, first class postage prepaid, in accordance with Rule 33 of the Rules of this Court, to each of the persons listed below. I further certify that all parties required to be served have been served.

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This 4th day of April, 1980.

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